MDA CONSULTING

PRESENTS

FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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GENERAL: THE IMPORANCE OF BEING NICE!

Introduction

A Beginner's Guide to the niceties of keeping records on construction contracts and avoiding a pointless and painful death by way of arbitration hearing

"I never travel without my diary. One should always have something sensational to read in the train." [Oscar Wilde, The Importance of Being Earnest]

As everyone knows, lawyers are very nice people.

Before you are heard to protest too loudly against this statement, it is important to bear in mind that the meaning that you ascribe to it depends upon, among other things, your understanding of the word nice.

Back when Oscar Wilde was still earnestly grappling with the closet doors of the age, the word "nice" didn't just have the colloquial meaning we commonly attribute to it today i.e *"[a]greeable, attractive, delightful, well-favoured, satisfactory, kind, friendly, considerate, generally commendable"*[1]

In other words, all those descriptors that you feel yourself preparing to declare have absolutely no business being in the same sentence as the word "lawyer".

The word "nice" also meant:

*"1. Fastidious, dainty, hard to please, of refined or critical tastes; precise, punctilious, scrupulous, particular (*must not be too nice about the means*)…*

*2. Requiring precision, care, tact, or discrimination, (*a nice experiment, question, problem, point, negotiation*)…*

*3. Minute, subtle, (*a nice distinction, shade of meaning*)…*

*4. Attentive, close, (*a nice inquiry, observer*)…"*[2].

Now, quite possibly excluding the word "dainty", and bearing in mind that the word "punctilious" means *"[a]ttentive to…details of conduct, duties, etc"*[3], you must admit that the opening statement to this article is not quite as controversial as it appears. Or must you?

If you are half as nice as your average lawyer, and not familiar with the language commonly used in the late 1800's (as your average lawyer most certainly is), you might demand to see some proof

[1]The Concise Oxford Dictionary of Current English, (6th ed), Oxford at the Clarendon Press, 1976, page 735

[2]The Concise Oxford Dictionary of Current English, (6th ed), Oxford at the Clarendon Press, 1976, page 735

[3]The Concise Oxford Dictionary of Current English, (6th ed), Oxford at the Clarendon Press, 1976, page 901

before you accept anything this article has to say on the matter. Particularly as it is written by a lawyer, who may or may not have some sort of unfathomable bias towards the profession and who, it should be mentioned at this point, has also been known to be nice, on a least one occasion.

As this proof, you are presented with The Concise Oxford Dictionary of Current English (6th edition), published by the Oxford at the Clarendon Press in 1976, which contains the definition of the word "nice" on page 735.

Now what is a word in a dictionary if not *"set down for remembrance or reference, put in writing or other legible shape, represent[ed] in some permanent form"* or, in other words, recorded[4].

Had this record not been available, it would have been a sad day for lawyers everywhere, who would have lost their right to refer to themselves as "nice people", as the original meaning of the word "nice" was distorted through the passing of time.

Now go ahead and apply this fuzzy logic to the spin cycle that is the common construction claim.

Picture this. You are a contractor. The Engineer/Principal Agent/Project Manager, in a never yet before heard of miscalculation of time frames, does not have the necessary drawings ready for you to begin construction, as per your programme.

The Engineer/Principal Agent/Project Manager, in an unprecedented move, which has also never yet before been heard of, admits that he made an error and invites you to submit a claim, in terms of the claims provisions of the contract, proving your loss.

The Engineer/Principal Agent/Project Manager, once again making history, grants your claim for both an extension of time with associated preliminary and general items, and the additional costs occasioned by the delay. Not for the grossly inflated sums that you claimed mind you, but for what, all things said and done, would probably be fair and reasonable if you closed one eye and squinted slightly at the numbers.

The Employer, still reeling from the shock of this sudden turn of events, disputes the Engineer/Principal Agent/Project Manager's decision, and in a move patented somewhere before the dawn of time, lawyers up. The old bat, probably born some thirty to forty years before the patenting of that particular move, has the matter before an arbitrator at a lightning fast pace belying the greyness of his remaining hairs, and before you know it you are facing down a grim faced arbitrator while Vlad the Impaler "unpacks" your claim at the hearing.

Vlad is a particularly nice gentleman and he spends many hours requiring you to justify and prove each and every cent and second you have claimed. Death at this point is probably inevitable, but whether it is from boredom or disappointment will depend upon the type of records you kept during the course of the project.

Each of the four main standard form contracts (FIDIC, GCC, NEC3 and JBCC) require claims submitted to the Engineer/Principal Agent/Project Manager to be substantiated.

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[4]The Concise Oxford Dictionary of Current English, (6th ed), Oxford at the Clarendon Press, 1976, page 934

Clause 20.1, paragraph 4 of the FIDIC Red Book[5] requires the Contractor to *"keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer."*

Clause 48.3.1 of the GCC 2004[6] states:

> *"All facts and circumstances relating to the claims shall be investigated as and when they occur or arise. For this purpose the Contractor shall deliver to the Engineer records, in a form approved by the Engineer, of all the facts and circumstances which the Contractor considers relevant and wishes to rely upon in support of his claims, including details of all Construction Equipment, labour and materials relevant to each claim. Such records shall be delivered promptly after the occurrence of the event giving rise to the claim concerned."*

Clause 10.1.3.1 of the GCC 2010[7] says substantially the same thing.

Clause 15.9 of the JBCC Principal Building Agreement[8] requires the Contractor to *"maintain daily records of the number and categories of persons and plant employed on the* ***works*** *and…provide copies thereof to the* ***principal agent*** *on request".*

The NEC3[9] deals with records under three clauses.

Clause 16 requires either the Contractor or the Project Manager to give an early warning notice to the other when they become aware of a matter that could delay or increase the cost of the works. Early warnings are entered in a risk register, which becomes a record of risks identified and the decisions taken in order to mitigate them.

Clause 31.2 requires the Contractor to show, among other things, details of start, end and key dates, dates access and documents are required and details of the resources and equipment which he plans to use in the execution of the works.

Clause 62 requires the Contractor to submit, for a compensation event, *"details of this assessment with each quotation. If the programme for remaining work is altered by the compensation event, the* Contractor *includes the alternations in the Accepted Programme in his quotation."*

Records will include photographs, meeting minutes, daily diaries, progress reports, labour returns, subcontract records, drawing registers, correspondence and any risk registers.

Now the question becomes, which records do you need for a particular claim and what are you using these records to show. The answer to this question (well, actually two questions if you want to be nice about it) is

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[5]Fédération Internationale des Ingénieurs-Conseils Conditions of Contractor for Construction for Building and Engineering Works Designed by the Employer, First Edition, 1999

[6]South African Institution of Civil Engineering (SAICE), General Conditions of Contract for Construction Works, 1st Edition, 2004

[7]South African Institution of Civil Engineering (SAICE), General Conditions of Contract for Construction Works, 2nd Edition, 2010

[8]Joint Building Contracts Committee Principal Building Agreement, Series 2000, Edition 5.0, July 2007

[9]NEC3 Engineering and Construction Contract, June 2005

always to ask yourself "What would Vlad do?".

Vlad would demand that you demonstrate exactly when the delay started. This can be done by producing an approved programme, demonstrating the date that you expected to start work. Perhaps also an information required schedule, which was delivered to the Engineer/Principal Agent/Project Manager, showing the date you needed the drawings in order to start work, as per the programme.

Note the requirement for an accepted programme and an information required schedule delivered to the Engineer/Principal Agent/Project Manager. This is so that Vlad, driven to desperation, doesn't try to allege that you are "reconstructing after the fact" i.e. telling a bald faced whopper.

The end of the delay can then be proven by the date received on the drawing register (again signed by the Engineer/Principal Agent/Project Manager) or the date on the drawing itself.

Vlad would also try to prove that the work, delayed by the late drawings, was not on the critical path and demand that you prove that you were not occupied by other work at the time of the "alleged" delay. This is where daily diaries, signed by the Engineer/Principal Agent/Project Manager, will come in very handy. So will any meeting minutes, risk registers, correspondences and progress reports where the delay is noted and photographs demonstrating that there was no progress on site.

These daily diaries, minutes, correspondences, progress reports and photographs, as well as your labour returns can also be used to demonstrate the resources on site. How many items of plant were left standing immobile like pieces of prehistoric modern art and how many hard working employees were left forlorn and grumbling at the shortage of gainful occupation.

You will then prove how much all of this cost you, by producing wage and plant hire records, perhaps invoices for the cost of your de and re establishment from site and each of your subcontractors own set of immaculate records.

Pay attention to these niceties of record keeping, ensure your subcontractors do the same, and Vlad will be left with nothing to do but pack it in and go in search of his next victim.

On a more serious note and in conclusion, the key to successful record keeping is the identification of risk. If you can identify what is most likely to cause delays and / or cause you to incur additional cost, then you know which records will be the most important going forward.

Tedious or not, records should be kept daily, ensuring that they are available when the inevitable happens and the expected risk occurs. There being no "I" in team and you not being able to do everything yourself, this means that your staff need to know which records should be kept and what should be contained in them, in order to prove your loss. Similarly, a cupboard full of paper is no use to man nor beast, records need to be agreed. The provisions of GCC 2010 clause 10.1.3.6 encourage such agreement and this is a positive sign!

Remember, he who has the records wins!!!!

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